

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.1494 OF 2019
IN
WRIT PETITION NO.2307 OF 1993

Union of India and another ... Applicants
Vs.
Jahangir Byramji Jeejeebhoy through his heirs
Rusi J. Jeejeebhoy and others ... Respondents

Mr. Anil Singh, Additional Solicitor General, i/b. Mr. Girish J. Paryani
for Applicants.
Mr. Pankaj J. Das for Respondent No.1a.

CORAM : R. G. KETKAR, J.
DATE : JULY 9, 2019

P.C. :

Not on Board. At the request of Mr. Singh, taken up in the
production Board.

2. Heard Mr. Singh, learned Additional Solicitor General of India
for the applicants and Mr. Das, learned Counsel for the respondent
No.1a at length.

3. By this Application, the applicants have prayed for condoning the
delay of 12 years and 158 days in filing this application for restoration;
for recalling the order dated 10.10.2006 passed by this Court in Writ
Petition No.2307 of 1993 thereby restoring the Petition to its original
position together with interim order dated 18.11.1994 passed by this
Court. The applicants have also prayed for stay of the execution and
implementation of the order dated 15.04.2019 passed by the learned trial
Judge below exhibit-31 in Darkhast No.16 of 2014. By that order, the

learned trial Judge rejected the application filed by the applicants for stay of the execution proceedings till the decision is rendered by this Court.

4. Respondent Jahangir Byramji Jeejeebhoy, since deceased, hereinafter referred to as 'Jahangir', had instituted Civil Suit No.2599 of 1981 against the applicants, hereinafter referred to as 'defendants'. By order dated 02.05.1987, the learned trial Judge decreed the Suit. Aggrieved by this decision, defendants preferred Civil Appeal No.850 of 1987 in the Court of Additional District Judge, Pune. By order dated 29.08.1992, the learned District Judge dismissed the appeal. Aggrieved by these orders, defendants instituted Writ Petition No.2307 of 1993 in this Court. The Petition came up for admission on 08.11.1994. After hearing the learned Counsel for the defendants, Petition was admitted by issuing Rule. Interim order in terms of prayer clause (b) was granted. The Petition was ordered to be heard along with First Appeal No.496 of 1980. It appears that the Petition was listed for final hearing before this Court on 10.10.2006. As none appeared for the defendants, Petition was dismissed. Rule was discharged and interim order was vacated. The defendants have taken out the present application for condoning the delay of 12 years and 158 days in filing the application as also for recalling the order dated 10.10.2006 whereby Writ Petition was dismissed in default and interim order was vacated.

5. In support of this Application, Mr. Singh submitted that as the Petition is dismissed in default and not on merits, this Court will restore the Petition to its original position subject to imposing conditions such as payment of costs. He submitted that the defendants are ready and willing to argue the Petition for final hearing. He further submitted that defendants are ready and willing to give undertaking to this Court that in

case the Petition is dismissed, they will handover vacant and peaceful possession of the suit property to the plaintiffs.

6. Mr. Singh has taken me through the application for restoration dated 12.04.2019 as also additional affidavit of Rajendra Rajaram Pawar dated 04.07.2019. He further submitted that though the Petition was dismissed on 10.10.2006, the respondents - decree holders did not file Darkhast till the year 2014. In other words, decree-holders filed Darkhast after 8 years after dismissal of the Petition. He submitted that the notice of Darkhast was served on the defendants only on 18.03.2016. The Department immediately wrote to the Additional District Government Pleader on 21.03.2016 and 30.03.2016 for defending the execution proceedings on behalf of the defendants. He submitted that the defendants were contesting the execution proceedings before the executing Court. In the meantime, department sought legal opinion from the Branch Secretariat, Ministry of Law and Justice on what steps could be taken by the Department. The Branch Secretariat has advised filing of the present application for setting aside the order of dismissal of the Petition and accordingly the application is filed in this Court. He submitted that the delay occasioned in filing the application is neither deliberate nor intentional and it is occasioned due to oversight. He submitted that in case the Petition is not restored to its original position, the land in dispute which belongs to the Government will be lost without considering the Writ Petition on merits. The said property in fact is allotted to the officer having a rank of Major General who oversees the operational logistic issues of the entire Southern Command of the Army. He submitted that while considering the application for condonation of delay, the Court is required to adopt liberal approach. In support of this submission, he relied upon the following decisions:

a. ***Collector, Land Acquisition Vs. Katiji, (1987) 2 SCC 107***, and in

particular paragraph 3 thereof;

b. ***Robin Thapa Vs. Rohit Dora, Civil Appeal No.4507 of 2019*** decided by the Apex Court on **08.07.2019**, and in particular paragraphs 7 to 9 thereof.

7. On the other hand, Mr. Das submitted that no case is made out for condoning the inordinate delay of 12 years and 158 days in filing the application. He submitted that unless sufficient cause for condoning the delay is made out, as a matter of right, applicant cannot claim condonation of delay. He submitted that the Suit is instituted in the year 1981 by Jahangir. After his death, his legal representatives, namely, 1-A Hombai Jahangir Jeejeebhoy, 1-B Rusi Jahangir Jeejeebhoy and 1-C Cawas Jahangir Jeejeebhoy were brought on record. Hombai and Cawas also died during the pendency of this Petition and only respondent No.1-B Rusi is alive. Rusi is 80 years old. He submitted that respondents are ready and willing to give undertaking to this Court that in case the defendants handover possession of the suit property to them, after restoration of the Petition if the Petition is allowed, they will handover vacant and peaceful possession of the suit property to the defendants before approaching the Apex Court.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that Writ Petition was dismissed in default on 10.10.2006. In paragraph 4 of the application, it is asserted thus,

“4. The petitioners state that Advocate for petitioner could not attend the matter on that day and the petitioner department was also not aware of the said dismissal on default of non-appearance. The petitioners state that the dismissal is not due to negligence and the same was inadvertently could not be attended. The petitioners state that the respondents then filed execution application vide Darkhast No.16 of 2014 before the 3rd Additional Judge,

Small Causes Court, Pune. The notice of Darkhast seeking execution of the decree was issued by the Hon'ble Court which was received by the department on 25.02.2019.”

9. A perusal of paragraph 4 extracted hereinabove shows that on oath, solemn statement is made that notice of Darkhast No.16 of 2014 for execution of the decree issued by the executing Court was received by the Department on 25.02.2019. As against this, in paragraph 3 of the additional affidavit dated 04.07.2019 made by Rajendra Rajaram Pawar, it is stated that the averments made in paragraph 4 as regards service of Darkhast on 25.02.2019 is factually incorrect. Notice of Darkhast No.16 of 2014 was received by the defendants on 18.03.2016. The error in the application is out of inadvertence for which he tendered unconditional apology. It is further stated that inadvertent mistake on facts as to knowledge of execution proceedings was purely because of oversight in the light of possibilities of issuance of possession warrant by the executing court and requirement of expeditious urgency of moving before this Court to save the proceedings in litigation since 1981 which otherwise would have got frustrated. He stated that the same is nothing beyond human error.

10. In paragraph 4(b), it is stated that department was regularly following up with its panel lawyer till about 2003. It appears from the record that the Petition was being listed occasionally as some heirs were to be brought on record till about 2001. Thereafter, the matter was to come up for final hearing. Since the matter was not coming up for final hearing, the matter was missed out by the Department. It is on this background, Writ Petition came to be dismissed in default on 10.10.2006.

11. In paragraph 4(f), it is stated that Department learned about

dismissal of the Petition only on 18.03.2016 when a notice of Darkhast No.16 of 2014 was served on the Department. Instead of moving this Court immediately for restoration of the Petition, at least upon acquiring knowledge about dismissal of the Petition on 18.03.2016, the Department wrote letter to the Additional District Government Pleader on 21.03.2016 and 30.03.2016 for entering appearance and defending the Department in the execution proceedings. It appears that on 04.10.2016, the executing Court passed 'no say' order. The Department filed application for setting aside 'no say' order. The application for setting aside 'no say' order was allowed by order dated 30.10.2018. In paragraph 4(i), it is stated that in the meanwhile, the Department sought legal opinion from the Branch Secretariat, Ministry of Law and Justice on what steps could be adopted by the Department.

12. The assertions made in paragraph 4 are bereft of any particulars and are totally vague. In fact the solemn statement made in paragraph 4 that notice of Darkhast for execution of the decree issued by the executing Court was received by the Department on **25.02.2019**, to put it mildly, is incorrect statement. In view of paragraph 3 of the additional affidavit dated 04.07.2019 made by Rajendra Rajaram Pawar, it is evident that notice of Darkhast was received by the defendants on **18.03.2016**. It is material to note that no particulars are given as to when the Department sought legal opinion. There is also no explanation as to why Department did not instruct lawyer in the High Court to apply for restoration of the Petition and why the Department defended execution proceedings. It is worthwhile to note that execution proceedings were filed by the respondents only because Writ Petition was dismissed. If the Writ Petition was restored, automatically the execution proceedings would have been stayed by the executing Court. Instead of adopting appropriate proceedings, the defendants unnecessarily went on defending the execution proceedings. In paragraph 4(b) though it is

stated that Department was regularly following up with its panel lawyer till 2003, this statement is also not substantiated by producing any document. Even if I accept that the Department was regularly following up with its panel lawyer till 2003, there is no explanation worth the name as to why the Department did not follow up the matter between 2003 and 2006 when the Petition was dismissed in default. That apart, equally, there is no explanation as to why no follow up action was taken by the officers between 2006 and 2016 when Department acquired knowledge about dismissal of Writ Petition on 18.03.2016.

13. It is no doubt true that while considering the application for condonation of delay, the expression 'sufficient cause' has to be liberally construed. It, however, does not mean that without making any sufficient cause, the Court will condone the delay regardless of the length of the delay. In the present case, the delay is of 12 years and 158 days. A perusal of the application as also the additional affidavit hardly indicates any sufficient cause for condoning the unpardonable delay of 12 years and 158 days.

14. Mr. Singh submitted that in case the Petition is not restored to its original position, the land in dispute which belongs to the Government will be lost without considering the Writ Petition on merits. He submitted that the suit land belongs to the Government and that was held on old grant terms by the plaintiffs' predecessor-in-title.

15. In the case of **Balwant Singh Vs. Jagdish Singh, (2010) 8 SCC 685**, the Apex Court in paragraphs 25 to 27 observed thus,

“25. We may state that even if the term `sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal

construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

27. The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party.”

16. In paragraph 29, the Apex Court referred to the decision in *Ramlal Vs. Rewa Coalfields Limited*, **AIR 1962 SC 361**, and extracted paragraphs 7 and 12. In paragraph 12 of that report, it was observed that the proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone.

17. Applying the principles laid down by the Apex Court in **Balwant Singh's case** (*supra*) to the facts of the present case, the reliance placed by Mr. Singh on the decisions of the Apex Court in **Collector Land Acquisition** (*supra*) and **Robin Thapa** (*supra*) do not advance the case of the applicants. Basically the applicant has not made out a sufficient cause for condoning the inordinate delay of 4538 days (12 years and 158 days). It is also necessary to bear in mind that respondent No.1a is an innocent litigant. The negligence, if any, lies at the doors of the applicants. Because of the negligence on the part of the applicants, respondent No.1a who is an innocent litigant should not suffer.

18. During the course of hearing, I suggested Mr. Singh that in case the defendants are ready and willing to handover possession of the suit property to the respondents, the Court will consider restoring the Petition to its original position. The respondents in turn will give undertaking to the effect that in case the defendants succeed in the Petition, before approaching the Apex Court, they will handover possession of the suit property to the defendants. Upon taking instructions, Mr. Singh submitted that defendants are not ready and willing to handover possession of the suit property. In view of the aforesaid discussion, no case is made out for condoning the delay. Hence, Civil Application fails and the same is dismissed.

(R. G. KETKAR, J.)